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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1976

No.76-467

RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY,a partnership, and HARRY B. HELMSLEY,

Appellants,

-against-

THE CITY OF NEW YORK,

Appellee.

On Appeal From The Court Of Appeals
Of The State Of New York

MOTION TO DISMISS

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Appellee ("City") moves to dismiss the appeal on the ground that one of the federal questions presented is not substantial and the other was neither properly raised nor expressly decided.

FIRST QUESTION PRESENTED

(a)

To the extent that appellants ("owners") have adopted the jurisdictional statement in Fred F. French Investing Company, Inc. v. The City of New York, No. 76-460, the Court is respectfully referred to our motion to dismiss therein, which is to be submitted simultaneously with the instant motion. Copies of our motion papers in French will have been served upon the appellants here.

(b)

However, an additional note on finality is indicated. The French appellant urged only that the effect of the zoning change was to vest in the City title to the fee. But the owners, while purporting to reserve their right on appeal to press that position (150)*, moved for "reargument" on the

*Numbers in parentheses refer to pages of the Record, unless otherwise indicated.

grounds that a "de facto" temporary appropriation" had taken place before the declaration of invalidity and restoration of the prior zoning classification, thus entitling them to recover for the loss of use of the land "during the period the illegal zoning amendment was in effect" (152). The motion was denied with the observation that a compensation issue had not been decided and that in any event proof of loss had to await trial (170).

"ADDITIONAL" QUESTION PRESENTED

The owners urge the "additional" question of whether they are entitled to "damages as for a temporary taking". This was neither properly raised nor expressly decided.

Such an issue was raised at nisi prius on the owners' motion for "reargu-

ment" (149-155). No appeal was taken from the denial of that motion (171).

The owners' briefs in the Court of Appeals, submitted prior to their motion for reargument in that Court, contained no argument regarding "temporary taking". Even if their failure to appeal had not precluded them from asserting it, they did not do so in fact.

It was not until they moved for reargument in the Court of Appeals that they may have raised the question, when they used a term such as "temporary taking". Under New York practice it was then too late. Reilly v. Steinhart, 218 N.Y. 660 (1916).

The owners mistake the issue which was tendered to the Court of Appeals and which it refused to decide. It was not one of compensation based on a taking

but one of damages, as in tort, flowing from an illegal exercise of discretionary governmental power. Cf. Visidor v. Cliffside Park, 48 N.J. 214, 225 A. 2d 105 (1966), cert. den. 386 U.S. 972; Keystone Associates v. State of New York, 33 NY 2d 848, 850-851 (dissenting opinion), 307 N.E. 2d 254 (1973). The compensation issue presented by the owners was the same as that here presented by appellant in French. Their main brief in the Court of Appeals recited that the owners "agree with and adopt the statement of facts and argument" of that appellant. The Court of Appeals decided it against them. The damage issue had been pressed by the City.

The distinction between the issue so adopted by the owners and the issue tendered by the City is evidenced in the Court of Appeals opinion at the first full paragraph appearing at page 2a of the jurisdictional

statement in French. It appears very clearly at page 14a, where the Court comments that the owner never made an unequivocal claim with respect to damages but "Instead, it claims compensation for value appropriated as for an 'inverse' taking in eminent domain", a "view of the invalid amendment... not adopted for the reasons discussed at length earlier". That view of the invalid amendment was the one which appellant French had argued at length and which was adopted by the owners.

To the extent that the instant jurisdictional statement (p. 4) observes that the City "conceded" something during oral argument in the Court of Appeals, it is correct. It was a question from the bench, asked of counsel for the City, before other counsel had been heard, which prompted the "concession". It was not, as set forth at

page 4 of the jurisdictional statement, that the "pleadings were broad enough to encompass a claim for a temporary taking". Counsel for the owners who argued in the Court of Appeals was more accurate in his affidavit on the motion for reargument in that Court. There he wrote that the concession was that the pleadings were "broad enough to encompass a claim for damages caused by the enactment of the zoning amendment."

The concession affords an additional insight into the reference by the Court of Appeals to the absence of an unequivocal claim for damages. In New York a pleading is not vitiated by an erroneous characterization of the asserted wrong or by a request for relief which is wholly improper. The pleader is entitled to such relief as is warranted by the facts. Also, pleadings are liberally construed. The City read the

owners' pleading (89-90) to assert a claim not only of inverse condemnation of the fee but also for damages independent of a taking, and it asked for a declaration against such a claim. It was that issue which the Court of Appeals stated was not properly before the Court. There was no refusal to decide any other issue before it.

CONCLUSION

The appeal should be dismissed.

New York, N.Y.

October 27, 1976

Respectfully submitted,

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